OVERVIEW

FAMILY AND MEDICAL LEAVE

ACT OF 1993

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I. SUMMARY

The Family and Medical Leave Act of 1993 (FMLA) is a federal law which became effective August 5, 1993. FMLA is administered and enforced by the Wage and Hour Division of the U.S. Department of Labor.

In general, the Family and Medical Leave Act entitles a qualified employee to a total of 12 workweeks of leave during a "rolling" 12-month period measured backward from the date an employee uses any qualifying Family and Medical leave:

- for the birth of a child, and to care for the newborn child;
- for placement of a child with the employee for adoption or foster care;
- to care for the employee's spouse, parent or child with a serious health condition (refer to Section II for definitions); or
- because the employee is unable to perform one or more of the essential functions of his/her job due to a serious health condition.

(NAC 284.5234; 284.5811)

FMLA leave may be unpaid, or under certain circumstances, an employee may request or an agency may require an employee to substitute appropriate types of paid leave for leave without pay.

An employee ordinarily must provide 30 days' advance notice when the need for leave is foreseeable. This notice must be at least verbal notice sufficient to make the employer aware of the need for FMLA-qualifying leave and the anticipated timing and duration of the leave. The employee does not have to expressly assert rights under FMLA, however, or even mention FMLA.

An agency is required to maintain an employee's health coverage during the leave period on the same basis as coverage would have been provided if the employee had been continuously working during the FMLA leave. Once the leave period is concluded, the employee must be reinstated to the same or an equivalent job.

For purposes of the Family and Medical Leave Act, the State of Nevada is considered a single employer.

The material contained in this overview covers the major provisions of the FMLA as it applies to State employees. The overview is not a substitute for the Family and Medical Leave Act of 1993, the associated federal regulations (29 C.F.R. Part 825), or the Rules for State Personnel Administration (Chapter 284 of the Nevada Administrative Code). The material is current as of the publication date but is subject to change as laws and regulations are modified.

II. DEFINITIONS

CHILD (NAC 284.52315)

A biological, adopted or foster child, a stepchild, a legal ward or the child of a person with the daily responsibility of caring for and financially supporting that child; and who is under 18 years of age or is 18 years of age or older and incapable of caring for himself because of a mental or physical disability.

PARENT (NAC 284.5237)

The biological parent of an employee or the person who had the daily responsibility of caring for and financially supporting the employee when the employee was a child. The term does not include a parent of the spouse of an employee.

CARE (NAC 284.5231)

The care that is provided when an employee:

- Provides psychological comfort and reassurance to his spouse, child or parent with a serious health condition who is receiving inpatient or home care;

- Substitutes for another person who is caring for the employee's spouse, child or parent who has a serious health condition;

- Makes arrangements for any change in the care of his spouse, child or parent with a serious health condition; or

- Provides physical or psychological care to his spouse, child, parent or other member of his immediate family, who is unable to provide for his own:

    a) Basic medical, hygienic or nutritional needs;
    b) Safety; or
    c) Transportation to a provider of health care.

SERIOUS HEALTH CONDITION (NAC 284.5239)

- An illness, an injury, or a physical or mental condition which involves:

    a) Inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or
    b) Continuing treatment by or under the supervision of a provider of health care for one or more periods of:

1) Incapacity of more than 3 consecutive calendar days, and any subsequent treatment or period of incapacity related to the same condition that also involves continuing treatment.
2) Incapacity because of pregnancy or for prenatal care. *(A visit to the health care provider is not necessary for each absence.)*
3) Incapacity because of a chronic serious health condition, or treatment for such incapacity. A chronic serious health condition is one that continues over an extended period of time, requires periodic visits for treatment by or under the direct supervision of a health care provider, and which may cause episodic periods of incapacity. *(e.g., asthma, diabetes. A visit to a health care provider is not necessary for each absence. For example, an employee with asthma may be unable to report to work because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.)*
4) Incapacity which is permanent or long-term because of a condition for which treatment may not be effective, but for which the person is under the continuing supervision of a health care provider. *(e.g., Alzheimer's, a severe stroke, terminal cancer)*
5) Absence to receive multiple treatments by or under the direction of a health care provider for restorative surgery after an accident or other injury.
6) Absence to receive multiple treatments by or under the direction of a health care provider for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment. *(e.g., chemotherapy or radiation treatments for cancer)*

- The term *serious health condition* does not include:

  a) Cosmetic treatments which do not require inpatient care and which do not result in medical complications; or
  b) Minor conditions such as the common cold, flu or an ear ache which do not result in medical complications.

- As used in this section, *incapacity* means the inability to work, attend school or perform other regular daily activities because of a serious health condition, including any treatment or recovery period.

CONTINUING TREATMENT (NAC 284.5232)

- Two or more treatments received from a provider of health care if the treatment normally requires a visit to the office of the provider of health care or a nurse or physician's assistant who is under the direct supervision of the provider of health care;
- Two or more treatments received from a provider of health care services, such as a physical therapist, under the orders of, or referred by, a provider of health care;

- At least one treatment received from a provider of health care which results in a regimen of continuing treatment under the supervision of a provider of health care (The taking of over-the-counter medications, or bed-rest, drinking fluids, etc. that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.);
- The continuing supervision of, but not necessarily active treatment by, a provider of health care because of a long-term or permanent condition for which treatment may not be effective; or
- Any combination of the treatments described above.

HEALTH CARE PROVIDER (NAC 284.52375)

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state or country in which the doctor practices;
- A podiatric physician, a dentist, a clinical psychologist, an optometrist or a chiropractor who is authorized to practice as a podiatric physician, a dentist, a clinical psychologist, an optometrist or a chiropractor by the state or country in which he practices and who is performing within the scope of his practice as defined by the law of that state or country;
- A nurse practitioner, nurse midwife or clinical social worker who is authorized to practice as a nurse practitioner, nurse midwife or clinical social worker by the state or country in which he practices and who is performing within the scope of his practice as defined by the law of that state or country;
- A practitioner in Christian Science who is listed with The First Church of Christ, Scientist, in Boston, Massachusetts. The list of practitioners may be obtained from the Christian Science Committee on Publication for Nevada, P.O. Box 92752, Henderson, Nevada 89009, (702) 566-1097, at a cost of $3.50; or
- A provider of health care, as defined in NRS 629.031, acting within the scope of his license whose certification of the existence of a serious health condition is acceptable to substantiate a claim for benefits under the public employees' benefits program.

INTERMITTENT LEAVE (NAC 284.5236)

Leave taken in separate periods rather than in one continuous period, because of a single injury or illness.

(Examples would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.)

REDUCED LEAVE (NAC 284.5238)

A schedule of leave which reduces the usual number of hours in a workweek or workday of an employee.

III. ELIGIBILITY REQUIREMENTS

To be eligible to take FMLA leave, an employee must have:

- Worked for the State of Nevada for at least 12 months;
- Worked or been in paid leave status for at least 1,250 hours during the 12 month period preceding the leave; and
- Be employed at a worksite where the State of Nevada (not a particular agency) employs at least 50 employees within 75 miles of the worksite.

Elected officials and certain policy-making appointees, immediate advisers and members of the elected officials' personal staff who are not subject to State civil service laws are not covered by the provisions of the Family and Medical Leave Act (e.g., an individual not included within the definition of the term *employee* under the Fair Labor Standards Act).

If an employee notifies the agency of the need for leave for an FMLA-qualifying reason before he/she meets the eligibility criteria the agency must either:

- Confirm the employee's eligibility based on a projection of the employee's eligibility as of the planned commencement date of the leave (eligibility may not subsequently be challenged); or
- Advise the employee when the eligibility requirement is met.

If the agency fails to advise an employee whether he/she is eligible for FMLA leave prior to the date the requested leave is to commence, or within 2 working days after the employee provides notice when less than 3 days' notice is provided, the employee will be deemed eligible for FMLA leave. The eligibility determination can be communicated by clearly on the Request for Leave of Absence form (NPD-60) or on the Employer Response to Employee Request for Family and Medical Leave form (NPD-62).

The 12 months an employee must have been employed need not be consecutive months; previous employment with the State of Nevada is considered. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment. For purposes of determining whether intermittent/occasional employment qualifies, 52 weeks is considered to be equal to 12 months.

With regard to salaried employees for whom no hours-worked records are kept, an agency must be able to clearly demonstrate that the salaried employee did not meet the requirement for 1,250 hours of service if leave is to be denied on that basis.

The determination of whether an employee has at least 1,250 hours of service in the preceding 12 months and has been employed by the State for a total of at least 12 months must be made as of the date leave commences. The determination of whether 50 employees are employed within 75 miles must be made when the employee gives notice of the need for leave.

IV. LEAVE ENTITLEMENT/PROVISIONS

An eligible employee is entitled to a total of 12 workweeks of leave during a "rolling" 12-month period measured backward from the date an employee uses any qualifying FMLA leave for one **or** any combination of the reasons listed in subsections A. through D. below. The right to FMLA leave applies equally to male and female employees.

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of leave would be used for calculating an employee's normal workweek. For certain employees a normal workweek exceeds 40 hours.

FMLA leave may be taken intermittently (e.g., a 3-hour medical treatment once a week) or on a reduced leave schedule (e.g., reducing a workweek from 40 hours to 20 hours) under certain circumstances. (Refer to Section IX). Only the amount of leave actually taken counts towards the entitlement to 12 workweeks of leave.

For purposes of determining the amount of leave used by an employee, the fact that a holiday occurs within the week has no effect; the week counts as a week of FMLA leave. If an employee is not scheduled to report for work (e.g., employee only works 3 weeks a month) only the weeks that the employee would normally report to duty count towards the 12-week entitlement.

FMLA leave may be unpaid or, under certain circumstances, an eligible employee may choose or an agency may require an employee to substitute appropriate types of paid leave for leave without pay. (Refer to Section VI)

A. THE BIRTH OF A CHILD, AND TO CARE FOR THE NEWBORN CHILD

- A period of disability before or after birth is considered leave for the serious health condition of the mother (refer to subsection D for applicable provisions).
- Entitlement to leave expires 12 months after the child's date of birth.
- An employee may take leave intermittently or on a reduced leave schedule only if the agency agrees. (Refer to Section IX)
- An employee may elect to substitute accrued annual leave for any part of the 12-week period.
- Use of sick leave would only apply to the mother while she is physically incapacitated due to childbirth (e.g., until released from doctor's care) or to either parent if the parent is caring for child/spouse with an authorized medical need. (Refer to subsection C and D)
- If a husband and wife are both employed by the State of Nevada, they are together entitled to only a total of 12 workweeks of leave. (No such limitation applies to an unmarried couple under the law.) Leave for the serious health condition of the mother is not subject to the combined limit.

B. THE PLACEMENT WITH THE EMPLOYEE OF A CHILD FOR ADOPTION OR FOSTER CARE

- Entitlement to leave expires 12 months after the date of placement of the child with the employee.
- FMLA leave can begin before the actual placement for adoption or foster care if an absence from work is required for the placement to proceed (e.g., counseling sessions, consultation with attorney, court appearance).
- An employee may take leave intermittently or on a reduced leave schedule only if the agency agrees. (Refer to Section IX)
- An employee may elect to substitute accrued annual leave for any part of the 12-week period.
- If a husband and wife are both employed by the State of Nevada, the adoptive parents together are entitled to only a total of 12 workweeks of leave. (No such limitation applies to an unmarried couple under the law.)

C. TO CARE FOR THE EMPLOYEE'S SPOUSE, CHILD, OR PARENT WITH A SERIOUS HEALTH CONDITION

- *Serious health condition* is defined in Section II.
- *To care for* encompasses both physical and psychological care and includes arranging third-party care for the family member. *Care* is defined in Section II.
- FMLA leave is not available to care for a parent-in-law.
- Leave may be taken intermittently or on a reduced leave schedule when medically necessary. Agency concurrence is not required when such leave is medically necessary. (Refer to Section IX)
- If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, an agency (in some instances) may require the employee to transfer temporarily to an available alternative position with equivalent pay and benefits for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. (Refer to Section IX)
- An employee may elect or an agency may require the employee to substitute any accrued annual leave, family sick leave, or catastrophic leave (subject to the provisions of NAC 284.575 through 284.576) for any part of the 12-week period. Nothing requires an agency to provide paid sick leave or catastrophic leave in any situation in which paid leave would not normally be provided.
- An agency may require that a request for leave be supported by a certification from a health care provider. (Refer to Section VIII)
- An agency may require a 2nd and 3rd medical opinion at the agency's expense.

D. A SERIOUS HEALTH CONDITION MAKES THE EMPLOYEE UNABLE TO PERFORM THE FUNCTIONS OF HIS OR HER POSITION

- *Serious health condition* is defined in Section II.
- *Unable to perform the functions of the position* means a health care provider finds that the employee is unable to work at all or is unable to perform one or more of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act.
- Any period before or after birth where a mother is not able to work for medical reasons is considered leave for a serious health condition.
- A work-related illness/injury which meets the definition of a serious health condition may be counted towards FMLA leave entitlement. (Refer to Section XIV)
- Leave may be taken intermittently or on a reduced leave schedule when medically necessary. Agency concurrence is not required when such leave is medically necessary. (Refer to Section IX)
- If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, an agency (in some instances) may require the employee to transfer temporarily to an available alternative position with equivalent pay and benefits for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. (Refer to Section IX)
- An employee may elect or an agency may require the employee to substitute any accrued annual leave, sick leave (subject to the provisions of NAC 284.554, 284.566- 284.568), or catastrophic leave (subject to the provisions of NAC 284.575 - 284.576) for any part of the 12-week period. Nothing in the Act requires an agency to provide paid sick leave or catastrophic leave in any situation in which paid leave would not normally be provided.
- An agency may require that a request for leave be supported by a certification from a health care provider. (Refer to Section VIII)
- An employer may require a 2nd and 3rd medical opinion at the agency's expense.
- An agency must comply with the provisions of the Americans with Disabilities Act (e.g., making reasonable accommodations; confidentiality of medical-related information; medical inquires to be job-related and justified by business necessity).

V. EMPLOYEE NOTICE REQUIREMENTS

NOTICE OF THE NEED FOR LEAVE

Unless an agency has less stringent notification requirements for employees requesting leave without pay, an employee must provide the agency with at least 30 days' advance notice before unpaid FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth of a child, placement for adoption or foster care, or planned medical treatment for a

serious health condition. If 30 days' notice is not practicable (e.g., due to a change in circumstances or a medical emergency) notice must be given as soon as possible and practical, taking into account all of the facts and circumstances in the individual case. This ordinarily would mean at least verbal notification to the agency within one to two working days of when the need for leave becomes known to the employee. An agency also has the option of waiving the notice requirement.

To provide notice means that an employee provides at least verbal notice sufficient to make an agency aware of the need for leave for an FMLA-qualifying reason and the anticipated timing and duration of the leave. An employee need not expressly assert rights under FMLA or even mention FMLA, but may only state that leave is needed for a expected birth, for example. If the employee is unable to do so personally, notice may be given by the employee's spokesperson. The agency should inquire further of the employee or spokesperson if it is necessary to obtain more information about whether FMLA leave is being sought and to obtain the necessary details of the planned leave. Notice is only required to be given once regardless of whether leave is taken on a continuous, intermittent or reduced schedule basis. However, an employee must advise the agency as soon as practicable if the dates of scheduled leave change or if the dates were initially unknown.

An agency may require an employee to comply with the agency's usual procedural requirements for requesting leave, such as completion of a Request for Leave of Absence form (NPD-60). Failure to follow internal procedures does not permit the agency to deny or delay an employee's taking FMLA leave if the employee gave timely verbal or other notice. In the case of a medical emergency, written advance notice may not be required of the employee.

If an employee fails to give 30 days' notice for foreseeable leave with no reasonable excuse for the delay, the agency may delay the taking of unpaid FMLA leave until at least 30 days after the employee provides notice (if consistent with agency policy on requests for leave without pay). It must be clear, however, that the employee had actual notice of the FMLA notice requirements (i.e., poster displayed at employee's worksite).

If annual leave, sick leave or catastrophic leave is used in lieu of unpaid leave, the usual notification requirements for the use of paid leave apply unless those requirements are more stringent than FMLA requirements.

Upon request, an employee who provides notice of the need to take FMLA leave on an intermittent or reduced leave schedule which is medically necessary must advise the agency of the reasons necessitating such a schedule and of any treatment schedule. The employee and agency are expected to work out a schedule that meets the employee's needs without unduly disrupting the agency's operations. The schedule is subject to the approval of the employee's/family member's health care provider.

NOTICE OF INTENT TO RETURN TO WORK

An agency may require an employee on FMLA leave to submit a statement of his/her intent to return to work at two-week intervals. The requirement to submit such a statement must be applied in a non-discriminatory manner and take into account relevant facts and circumstances related to the employee's leave situation.

If an employee gives unequivocal notice that he/she does not intend to return to work, the agency's obligations under FMLA to maintain group health benefits and restore the employee to the same or equivalent position cease unless the employment relationship continues (e.g., employee remaining on paid leave). If, however, an employee indicates he/she may be unable to return to work but expresses a continuing desire to do so, the agency's obligations continue.

VI. SUBSTITUTION OF PAID LEAVE

An employee may elect or an agency may require an employee in need of FMLA leave to substitute paid leave for leave without pay in certain circumstances as explained in this section. These substitution provisions are intended to mitigate the financial impact of wage loss due to family and medical leave. The substitution provisions ensure that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time on an unpaid basis which is necessary to attain 12 workweeks of FMLA leave.

State personnel regulations pertaining to the use of paid leave (e.g., notice and certification requirements) are generally applicable unless State requirements are more stringent than federal FMLA requirements.

Accrued annual leave may be substituted, at the agency's or employee's option, for any FMLA-qualifying purpose without limitation. For example, an employee would be able to use annual leave for any FMLA-qualifying purpose despite the fact that by reason of an employee's seniority or the staffing needs of the agency, a vacation would not normally be allowed at that time. If accrued annual leave is substituted for unpaid FMLA leave for a serious health condition, certification requirements governing the use of sick leave apply.

Subject to State personnel regulations governing the use of sick leave, accrued sick leave may be substituted, at the agency's or employee's option, for all or part of any unpaid FMLA leave that is needed by an employee to care for a qualified family member with a serious health condition or for the employee's own serious health condition. The substitution of accrued sick leave does not apply in any situation where the agency would not normally allow its use.

If an employee requests and is approved to receive catastrophic leave, it may be substituted for all or part of any unpaid FMLA leave needed for the employee's own serious health condition or needed by the employee to care for a qualified family member with a serious health condition.

A workers' compensation absence and an employee's FMLA 12-week leave entitlement may run concurrently when the employee's on-the-job injury or occupational illness meets the criteria of a serious health condition. An employee who is receiving benefits for a temporary total disability may elect to use sick or annual leave and if granted catastrophic leave to supplement temporary total disability benefits while on FMLA leave.

Paid leave which is used under circumstances which do not qualify for FMLA leave cannot be counted against an employee's entitlement to 12 workweeks of leave (e.g., sick leave used for a medical condition which is not a serious health condition).

Compensatory time is not a form of accrued paid leave, but rather an alternative form of paying an employee for overtime. An employee who has accrued compensatory time must be permitted to use it within a reasonable period after the request if it does not unduly disrupt agency operations. An employee may request the use of compensatory time for an absence that qualifies for FMLA but any compensatory time used does not count towards the employee's 12-week leave entitlement.

VII. DESIGNATION OF LEAVE AS FMLA LEAVE

An agency is responsible for designating paid leave or leave without pay as FMLA qualifying and promptly notifying the employee of the designation (typically within 2 working days). This determination must be based on information provided by the employee or the employee's spokesperson.

As explained in Section V, an employee is not required to specifically mention or assert rights under FMLA. A statement that leave is needed for a reason that qualifies for FMLA leave (e.g., expected birth; to care for parent with a serious illness) along with information regarding the timing and duration of the leave is considered sufficient notice.

In many instances an employee explains the reason for requesting paid leave or leave without pay, thus providing an agency with the information necessary to make a determination of whether the leave is FMLA leave. If a request for leave is denied because an employee requested leave without explaining the reason for the request, the employee is responsible for providing sufficient information so the agency is aware of the employee's entitlement to FMLA leave. In situations where the agency does not have enough information to make a determination of whether the leave is FMLA-qualifying, the agency should inquire further of the employee or the employee's spokesperson.

Upon learning that leave is being taken for an FMLA-qualified reason, the agency must notify the employee within two working days (absent extenuating circumstances) that the leave will be designated as FMLA leave. If this notice is given verbally, it must be confirmed in writing (e.g., notation on timesheet) no later than the following payday (or next subsequent payday if payday is less than one week away). As explained in Section XII, an agency is also required to provide the employee with a form titled Employer Response to Employee Request for Family

and Medical Leave (NPD-62). Any dispute as to whether leave qualifies as FMLA leave should be resolved through a documented discussion between the agency and the employee with records of the discussion and decision maintained in file.

An agency's decision to require an employee to substitute paid leave for unpaid leave or that paid leave be counted as FMLA leave must typically be made within two working days of the date the employee gives notice of the need for leave. The agency's designation of FMLA leave must be made before the leave starts, unless the agency does not have sufficient information regarding the employee's reason for leave until after the leave begins.

An agency cannot designate leave as FMLA leave retroactively if the agency had the required information to make a determination but failed to notify the employee. The agency may only designate leave prospectively as of the date of notification to the employee. Though the period preceding the notice to the employee does not count towards the entitlement to 12 workweeks of leave, the employee is subject to the full protections offered under FMLA.

If the agency learns that leave is for an FMLA purpose after leave has begun, the entire or some portion of the leave may be retroactively counted as FMLA leave. For example, an employee may suffer a serious accident which requires hospitalization while on annual leave and may request an extension of annual leave with unpaid leave. The agency may notify the employee that the unpaid leave as well as the annual leave (from the date of the injury) is being designated as FMLA leave.

With two exceptions, an agency may not designate leave as FMLA leave after the employee has returned to work. The first exception is a situation where the agency did not learn the reason for the absence until the employee returned to work (e.g., the employee was absent for only a brief period). The agency may, within two working days of the employee's return, designate the leave as FMLA leave with notice to the employee. In addition, if leave is taken for an FMLA reason but the agency was not aware of the reason, the employee must notify the agency within two working days of returning to work that the leave was for an FMLA reason. If the employee does not notify the agency within this time period, the employee cannot later assert FMLA protections for the absence.

The second exception is when the agency knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the agency is pending medical certification to substantiate the reason for the leave. In these situations, the agency should make a preliminary designation and notify the employee of the designation at the time the leave begins or as soon as the reason for the leave becomes known. The designation becomes final upon receipt of the confirming information. The designation must be withdrawn (with written notice to the employee) if, for example, the medical certification fails to confirm the reason for the leave was an FMLA reason.

VIII. MEDICAL CERTIFICATION REQUIREMENTS

An agency may require a medical certification from a health care provider (as defined in Section II) to support an employee's request for FMLA leave to care for his/her seriously ill spouse, child or parent, or for leave due to a serious health condition that makes the employee unable to perform one or more of the essential functions of his/her position, unless the employee is using paid leave and certification would not normally be required. In most cases, an agency must advise the employee if medical certification will be required within two working days of the date the employee either gives notice of the need for leave or commences leave (in the case of unforeseen leave). Certification may be requested at some later date if the agency has reason to question the appropriateness or duration of the leave. As explained in Section XII, the requirement to furnish medical certification and the consequence of failure to do so must be disclosed on the form titled Employer Response to Employee Request for Family or Medical Leave (NPD-62). An agency must give written notice of a requirement for medical certification each time an employee gives notice of the need for leave for which a certification will be required.

When an employee elects or an agency requires an employee in need of FMLA leave for a serious health condition to substitute sick leave or annual leave for leave without pay, the employee can only be required to comply with the medical certification requirements that apply to the use of sick leave. State personnel regulations provide that an appointing authority may request a medical certification for absences in excess of three consecutive working days or for cases of suspected abuse. (NAC 284.566)

An employee who is required to obtain a medical certification should be provided with the form titled Certification of Health Care Provider (NPD-61). Additional information beyond that requested on the form may not be required. If the agency finds that the certification form is incomplete, the agency should advise the employee and provide him/her with a reasonable opportunity to correct any deficiency.

An employee must provide the completed certification to the agency in a timely manner (i.e., within 15 calendar days unless it is not practicable under the circumstances). In the case of foreseeable leave, an agency may delay the taking of FMLA leave by an employee who fails to provide timely certification in response to the agency's request. When the need for leave is not foreseeable, an employee must provide certification within the time frame requested or as soon as reasonably possible under the particular facts and circumstances. If an employee fails to provide certification within a reasonable time, the agency may deny continuation of leave.

To determine whether an employee's serious health condition prevents the employee from performing one or more of the essential functions of the employee's job, the health care provider may review a description of the employee's essential job functions provided by the agency or, if none is provided, through discussion of the job functions with the employee. Guidance on determining the essential functions of a position is provided in NAC 284.356.

In situations where the employee is needed to care for a qualified family member with a serious health condition, the employee must indicate on the certification form the care he/she will provide to the family member and an estimate of the time period during which the care will be provided. The employee should then submit the form to the health care provider for certification of the family member's serious health condition and the need for the employee's presence.

If the employee submits a complete certification signed by a health care provider, an agency may **not** request additional information from the employee's health care provider. However, a health care provider representing the agency may, with the employee's permission, contact the employee's health care provider for purposes of clarification and authenticity of the medical certification. Provisions of the worker's compensation statutes which permit an employer to have direct contact with an employee's worker's compensation health care provider may be followed when an employee is on FMLA leave in connection with a workers' compensation claim.

All information concerning an employee's or family member's medical examination and related inquiries must be kept separate from an employee's personnel file and kept in a locked cabinet. Access to this information is limited to the employee, his current supervisor and the employee's appointing authority.

SECOND/THIRD MEDICAL OPINION

An agency that has reason to doubt the validity of a medical certification used to determine FMLA eligibility may require an employee to obtain a second opinion at the agency's expense from an independent health care provider (i.e., a provider not employed by the State of Nevada, and not regularly used by the State unless the employee/family member is located in an area with limited access to health care). If the two opinions differ a third medical opinion, at the agency's expense, may be required from a health care provider approved jointly by the agency and the employee. The third opinion is final and binding. An agency must reimburse an employee or family member for reasonable out-of-pocket travel expenses that were incurred to obtain a second or third medical opinion. An agency may not require the employee or family member to travel outside normal commuting distances to obtain a second or third opinion (except in unusual circumstances).

Pending receipt of a second or third medical opinion, the employee is provisionally entitled to the benefits of FMLA (e.g., maintenance of group health benefits). If entitlement to FMLA leave is not substantiated by these opinions, the leave must not be designated as FMLA leave.

RECERTIFICATION

Periodic recertification of an employee's or family member's serious health condition may be required.

For pregnancy, chronic, or permanent/long-term conditions an agency may request recertification at intervals of 30 days or more and only in connection with an absence unless:

- Circumstances described in the certification on file change significantly; or
- The agency receives information that casts doubt on the stated reason for the absence.

For other serious health conditions, recertification may be required:

- If the employee requests an extension of leave;
- If circumstances described in the certification on file change significantly;
- If the agency receives information that casts doubt on the stated reason for the absence;
- After the minimum duration of the period of incapacity designated on the current certification on file has passed when the current certification is valid longer than 30 days, or when leave is taken in the form of intermittent or reduced leave; or
- Except as noted above, at reasonable intervals of 30 days or more.

A second or third opinion is not allowed for recertification. If an employee does not provide recertification within the time frame requested (allow at least 15 days) or as soon as possible given the circumstances, the agency may delay the continuation of FMLA leave.

RELEASE TO RETURN TO WORK

An agency may require a statement from a health care provider that an employee is able to return to work (unless the employee takes intermittent leave) if the requirement is related to the health condition which necessitated the FMLA leave and is related to the employee's ability to perform one or more of the essential functions of his/her position. As explained in Section XII, the requirement to furnish a statement in order to return to work must be disclosed on the form titled Employer Response to Employee Request for Family or Medical Leave (NPD-62). An agency must give written notice of a requirement for a release to return to work each time an employee gives notice of the need for leave for which such a statement will be required. An agency that requires a statement in order to return to work should uniformly apply the policy for similarly situated employees. Restoration to employment may be delayed until the statement is submitted by the employee to the agency. An unauthorized absence may also result in disciplinary action.

A health care provider representing the agency may, with the employee's permission, contact the employee's health care provider to clarify information on the statement, but additional information may not be acquired. A second or third opinion is not allowed.

INABILITY TO RETURN TO WORK

As explained in Section XI, if an employee is unable to return to work because of the continuation, recurrence or onset of the employee's or family member's serious health condition, an agency may not recover group health premiums paid on an employee's behalf.

Accordingly, an agency may require a medical certification of the employee's or family member's health condition. If the certification is not provided within 30 days after the agency's request, the agency may recover the premiums it paid (unless the reason the employee did not return meets the test of other circumstances beyond the employee's control).

IX. INTERMITTENT OR REDUCED LEAVE

Under certain circumstances, FMLA leave may be taken intermittently or on a reduced leave schedule. Intermittent leave is leave taken in separate blocks of time due to a single illness or injury rather than for one continuous period of time (e.g., leave for occasional medical appointments or leave taken several days at a time for chemotherapy treatments over a period of months). A reduced leave schedule is a change in an employee's schedule for a period of time, normally from full-time to part-time (e.g., an employee works part-time because he/she is recovering from a serious health condition and is not capable of working full-time).

The increment of time in which leave may be taken is not limited. An employee may not be required to take more FMLA leave than necessary. If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken counts towards the entitlement to 12 workweeks of FMLA leave. For example, if a 40-hour employee works 20-hours per week under a reduced work schedule, the employee would use one-half week of FMLA leave each week. Accordingly, it would take 24 weeks to exhaust the employee's FMLA leave entitlement. If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave would be used for calculating an employee's normal workweek. If an employee's normal workweek is more or less than 40 hours, the pro-rata reduction of leave entitlement should be based on the number of hours that constitute that normal workweek.

Leave taken to care for an immediate family member with a serious health condition or for an employee's own serious health condition may be taken intermittently or on a reduced leave schedule when there is a medical need which is best accommodated through an intermittent or reduced leave schedule (e.g., medical treatment; recovery from a serious health condition). Intermittent leave or reduced schedule leave may also be taken to provide care or psychological comfort to a qualified family member with a serious health condition, or if the employee/family member is incapacitated due to a chronic serious health condition (regardless of whether he/she receives treatment by a health care provider). The treatment regimen and other information included on the medical certification form (refer to Section VIII) meets the requirement for certification of medical necessity.

Leave taken after the birth of a child or placement of a child for adoption or foster care may only be taken intermittently or on a reduced leave schedule if the agency concurs (e.g., employee, with agency's agreement, works part-time after the birth of a child). The agency's agreement is not required if the leave is medically necessary due to the employee's, spouse's or child's serious health condition.

Employees needing intermittent leave or leave on a reduced schedule are expected to consult with the agency to work out a schedule, subject to approval of the health provider, which does not unduly disrupt the agency's operations. If the employee neglects to consult with the agency to make an attempt to arrange a suitable treatment schedule when planning medical treatment, the agency may initiate the discussion and require the employee to attempt to make such arrangements (subject to approval of the health care provider).

ALTERNATIVE POSITION

An agency may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position if:

- An employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including during a period of recovery from a serious health condition; or
- The agency permits the employee to take leave intermittently or on a reduced leave schedule after the birth of a child or placement of a child for adoption or foster care.

Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

A transfer to an alternative position may require compliance with the American with Disabilities Act (ADA). In general, ADA allows an accommodation of reassignment to an equivalent, vacant position only if an employee (if covered by ADA) cannot perform the essential functions of his/her present position and an accommodation is not possible in the employee's present position, or such an accommodation would cause an undue hardship. Consult your agency's ADA Coordinator if you have questions in this area.

State personnel regulations pertaining to transfers to a position in the same or related class also apply (NAC 284.390) including the requirement that an appointing authority provide an employee with 5 working days' notice before making a transfer which will exceed 10 working days.

The alternative position to which an employee is transferred must have equivalent pay and benefits. An agency may transfer an employee to a part-time job with the same hourly rate of pay and benefits provided the employee is not required to take more leave than is medically necessary. An agency may not eliminate benefits which would otherwise not be provided to part-time employees; however benefits, such as annual and sick leave, which are normally based on the number of hours worked or in paid leave status would be prorated accordingly.

An agency may not transfer an employee to an alternative position to discourage an employee from taking FMLA leave or to cause a hardship to the employee (e.g., reassignment from the day shift to the graveyard shift).

An employee who has been transferred to an alternative position must be placed in the same job or a job that is equivalent to the one the employee left when he/she no longer needs to continue on FMLA leave.

X. RESTORATION TO POSITION

On return from FMLA leave, an employee is entitled to be returned to the same position he/she held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment, including privileges, perquisites and status. An equivalent position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. An employee is ordinarily entitled to return to the same shift or to the same or an equivalent work schedule and to the same or geographically proximate worksite. An employee is entitled to restoration even if he/she has been replaced or the employee's position has been restructured to accommodate the absence.

If an employee, as a result of FMLA leave, is no longer qualified for the position because of the inability to renew a license, attend courses, fly a minimum number of hours, etc., the employee must be given a reasonable opportunity to fulfill those conditions upon return to work.

If an employee is unable to perform the essential functions of the position because of a physical or mental condition, including the continuation of a serious health condition, the agency's obligations may be governed by the Americans with Disabilities Act (ADA). If an employee is a qualified individual with a disability within the meaning of ADA, the agency must make reasonable accommodations, etc., barring undue hardship, in accordance with ADA. At the same time, the agency must afford an employee his/her FMLA rights. Consult your agency's ADA Coordinator, if you have questions in this area.

IMPACT OF FMLA USE

Consistent with state personnel regulations, sick leave and annual leave do not accrue during any period of FMLA leave consisting of unpaid leave or catastrophic leave. As explained in Section XI, the amount of time on unpaid leave, in excess of 240 hours a year, affects an employee's pay progression date and completion date of a probationary period.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously working during the FMLA period. At the time reinstatement is requested, an agency must be able to show that an employee would not otherwise have been employed if the employee had continued to work instead of taking leave in order to deny restoration to employment (e.g., layoff; hired for a specific term only). If a shift has been eliminated or overtime work has decreased, a returning employee would not be entitled to return to that shift or to work the same overtime hours as before.

An employee's rights to continued leave, maintenance of group health benefits and restoration cease under FMLA if and when the employment relationship terminates. If the employee is rehired, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason.

When two or more businesses exercise some control over work or working conditions of an employee, the businesses may be joint employers under the FMLA (e.g., when a temporary help or leasing company supplies employees to a client employer). Job restoration is the primary responsibility of the primary employer (typically the temporary help or leasing company). The client employer (State agency) is responsible for accepting an employee returning from FMLA leave in place of the replacement employee if the client continues to utilize an employee from the temporary or leasing company and the temporary help or leasing company chooses to place the employee with the client.

XI. BENEFITS

Unless an employee elects otherwise, at the end of FMLA leave benefits must be resumed in the same manner and at the same levels as provided when leave began, subject to any changes in benefit levels that affected the entire work force. Benefits include all benefits provided or made available to employees by the State, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and retirement, regardless of whether such benefits are provided by a practice or written policy of the State through an employee benefit plan. In addition, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began. For example, if an employee elects to drop dependent health coverage while on unpaid FMLA leave, the dependent does not have to requalify for coverage when the employee returns to work. An employee is not entitled to accrue any additional benefits (e.g., sick leave, annual leave) or seniority during unpaid FMLA leave.

INSURANCE COVERAGE

During FMLA leave the State must maintain an employee's group health coverage on the same basis as if the employee had been working during the leave period.

Agencies must notify the Public Employees' Benefits Program, through submission of a benefits change form, whenever an employee begins or returns from paid or unpaid FMLA leave. The agency is responsible for paying the employer's contribution for employee coverage ($368.75 per month effective July 2000) while an employee is on FMLA leave. With certain exceptions, as explained later in this section, an agency may recover the employer's share of premium payments it made during unpaid FMLA leave if the employee does not return to work.

Any share of health plan premiums, such as premiums for dependent coverage or employee coverage through a health maintenance organization (HMO) which an employee paid prior to FMLA leave continues to be the responsibility of the employee during FMLA leave. An employee may also elect to discontinue dependent coverage while on FMLA leave. In order to do so, the employee must complete a benefits enrollment and change form.

Information regarding premium payment procedures, the possible consequences of failure to make timely payments, and the employee's potential liability for premiums made on the employee's behalf if the employee does not return to work must be disclosed on the form titled Employer Response to Employee Request for Family and Medical Leave (NPD-62; refer to Section XII).

A commitment to continue or drop dependent coverage should be obtained from the employee before FMLA leave begins. If an employee wishes to continue dependent coverage and/or employee coverage under a plan that requires the employee to pay a portion of the premium, the Public Employees' Benefit Program will bill the premium to the agency. The agency is responsible for collecting the full premium for dependent coverage and, if applicable, the employee's portion of the premium for employee coverage when sufficient funds are not available to take the premium through payroll deduction. Premiums are due by the 15th of each month for coverage for that calendar month. The employee has a 30-day grace period in which to make the premium payment.

If an employee does not make the payment during the grace period, the Public Employees' Benefit Program will terminate coverage due to non-payment of premiums unless the agency indicated on the benefits change form that it will pay the premium on the employee's behalf.

If an agency chooses to pay an employee's portion of any premium on the employee's behalf during unpaid FMLA leave, the agency may recover these payments from the employee through payroll deduction when the employee returns to work. The amount and schedule of payroll deductions should be communicated to the employee in advance. With certain exceptions, explained later in this section, premiums paid on the employee's behalf may also be recovered if the employee does not return to work.

Termination of coverage due to an employee's non-payment of premiums requires at least 15 days' prior written notice to the employee. Accordingly, a past due notice will be mailed by the Public Employees' Benefit Program to the employee if the employee does not make their premium payment when due or if the premium payment is not forwarded by the agency to the Public Employees' Benefit Program in a timely manner. The past due notice will inform the employee that coverage will be terminated retroactive to the last day of the month for which the employee paid for coverage. For example, if an employee begins unpaid FMLA leave on November 1, 2000, the premium for November is due November 15, 2000. If the premium payment is not received by the Public Employees' Benefit Program, a past due notice is generated. The notice states that if payment is not received by December 15, 2000, coverage will be terminated retroactive to October 31, 2000.

Agencies are responsible for paying the employer-portion of the premium for employee-only coverage for the entire period an employee is on FMLA leave. However, if coverage is terminated because the employee did not pay his/her portion of the premium, the agency's responsibility for paying the employer's portion of the premium will also cease. Questions regarding premium payment procedures may be directed to the Public Employees' Benefit Program at 684-7006.

If dependent coverage and/or the employee's coverage is terminated during FMLA leave, coverage may be reinstated through submission of a benefits and enrollment change form to the Public Employees' Benefit Program. Coverage will be reinstated effective the first day of the month in which the employee returns from FMLA leave. Premium payments are not prorated, therefore an employee who wishes to reinstate coverage must pay a full month's premium regardless of the date of return from leave. An employee should be notified in advance of the reinstatement procedure.

An employee who wants to maintain coverage under an optional insurance plan (e.g., voluntary supplemental life insurance, cancer care insurance) during unpaid FMLA leave is expected to make their premium payment directly to the plan administrator. An agency will *not* pay these premiums on the employee's behalf. The addresses and telephone numbers of the administrators of optional insurance plans are available by contacting the Public Employees' Benefit Program at 684-4085. An employee with questions regarding the continuation of these individual policies during FMLA leave should contact the appropriate plan administrator directly.

RECOVERY OF PREMIUMS IF AN EMPLOYEE DOES NOT RETURN TO WORK

An agency may recover both the employer's portion and the employee's portion of any premium payment it paid during unpaid FMLA leave, including the employer's contribution for employee coverage, if the employee fails to return to work after the employee's FMLA entitlement has been exhausted or expires, *unless* the reason an employee does not return is due to:

1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

2) Other circumstances beyond the employee's control. Examples include: situations where an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; or the employee is needed to care for a relative other than an immediate family member who has a serious health condition.

   Other circumstances beyond an employee's control would not include a mother's decision not to return to work to stay home with a well, newborn child.

An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after he/she returns to work, is deemed to have returned to work.

An agency may recover the premium payments by deducting the amount from any sum due the employee by the State (provided such deductions are not otherwise prohibited by law). If necessary, the agency may also initiate legal action.

When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the agency from recovering its share of premiums made on the employee's behalf, the agency may request a medical certification of the employee's or family member's serious health condition (certification form NPD-61). If the medical certification is requested by the agency but not provided by the employee within 30 days, the agency may recover the premium payments.

An agency may not recover its share of premium payments for the period an employee was on *paid* FMLA leave. This includes paid leave provided under a plan covering temporary disability, such as workers' compensation. Premiums paid by the State to continue an employee's health coverage during workers' compensation leave are not recoverable.

RETIREMENT

With respect to pension and other retirement plans, any period of unpaid FMLA shall not be considered a break in employment. However, service credit is not granted for any period of unpaid FMLA leave.

Accordingly, no retirement contribution will be accepted from an agency or an employee for the period an employee is on unpaid FMLA leave. This is consistent with State law which provides that a member of the Public Employees' Retirement System (PERS) is not credited with service for leave of absence without pay. For example, in order for a member of PERS to earn the right to receive a retirement allowance (vest), the member must complete five years of credited service. This means that an employee who takes twelve weeks of unpaid FMLA leave before completing five years of service must work an additional twelve weeks before becoming vested. Further information regarding the effect of FMLA leave on retirement benefits is available by contacting the membership division of PERS at 687-4200.

EFFECT OF LEAVE WITHOUT PAY

Consistent with Rule for Personnel Administration NAC 284, sick leave and annual leave do not accrue during any period of FMLA leave consisting of unpaid or catastrophic leave. An employee who is normally eligible for holiday pay is not entitled to receive holiday pay if he/she is on unpaid FMLA leave for his/her entire scheduled shift prior to the holiday.

The amount of time in excess of 240 hours a year in unpaid leave status affects:

- An employee's pay progression date (NAC 284.182)
- The completion date of a probationary period (NAC 284.448)

XII. EMPLOYER NOTICE REQUIREMENTS

Agencies are required to post and keep posted a notice explaining the provisions of the Family and Medical Leave Act and provide information concerning the procedures for filing complaints with the Wage and Hour Division. Refer to Section XVII for a copy of the required poster (WH Publication 1420). This poster should be displayed prominently at the various worksites within each agency where it can be viewed by employees and applicants. An agency that does not display the poster cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the agency with advance notice of the need to take FMLA leave.

Information regarding FMLA has been included in the State's employee handbook as required by the FMLA. The agency should ensure that all employees have the most recent version of the employee handbook.

EMPLOYER RESPONSE TO EMPLOYEE REQUEST FOR FAMILY OR MEDICAL LEAVE

Agencies are required to provide each employee who provides notice that he/she needs leave for an FMLA-qualifying reason with the form titled Employer Response to Employee Request for Family or Medical Leave (NPD-62). This form details the specific expectations and obligations of the employee and explains the consequences of a failure to meet the obligations. The form must disclose, as appropriate:

- That the leave will be counted against the employee's annual FMLA leave entitlement;
- Any requirement for the employee to furnish medical certification and the consequences of failure to do so;
- The employee's right to substitute paid leave, whether the agency will require the substitution of paid leave, and the conditions related to any substitution;
- Any requirement for the employee to make premium payments to maintain health benefits, the arrangements for making such payments, and the consequences of failure to make payments on a timely basis;
- Any requirement for the employee to present a release to return to work from a health care provider to be restored to employment;
- The employee's right to restoration to the same or an equivalent job upon return from leave;
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

The NPD-62 form must be provided to the employee the first time in each six-month period that the employee gives notice of the need for leave for an FMLA qualifying reason. The form should be given to the employee (or mailed if leave has begun) within a reasonable time - typically within two working days after the employee gives notice of the need for leave.

If the information disclosed on the form changes with respect to a subsequent period of FMLA leave during the six-month period, the agency must provide an updated NPD-62 form referencing the prior form and disclosing any information that has changed (e.g., if the initial leave was paid leave and the subsequent leave is unpaid leave, the agency would give instructions for making health premium payments). The updated form should be provided within two working days after the date of the employee's notice.

In addition, if an agency is going to require an employee to provide a medical certification or a release to return to work, this must be disclosed on the NPD-62 form each time during the six-month period that the employee gives notice of the need for leave.

If an agency fails to provide an employee with the Employer Response to Employee Request for Family and Medical Leave form, the agency may not take action against an employee for failure to comply with any provision required to be disclosed on the form.

XIII. PROHIBITED ACTS

The FMLA prohibits interference with an employee's rights under the law and with legal proceedings or inquiries related to an employee's rights. It is unlawful to:

- Interfere with, restrain, or deny the exercise of any right provided by the FMLA;
- Discharge or discriminate against any individual for opposing or complaining about any unlawful practice under the FMLA; or
- Discharge or discriminate against any individual because of involvement in any proceeding under or related to the FMLA.

Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.

An agency is prohibited from discriminating against an employee or prospective employee who has used FMLA leave. An agency cannot use the taking of FMLA leave as a negative factor in employment actions such as hiring, promotions or disciplinary actions. Also, FMLA leave cannot be counted under *no fault* attendance policies.

Employees cannot waive, nor can agencies induce employees to waive, their rights under FMLA. This, however, does not prevent an employee's voluntary and uncoerced acceptance of a light-duty job while recovering from a serious health condition.

If a joint employment relationship exists (e.g., if a temporary help or leasing company supplies employees to a client employer), the client employer (State agency) is responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees.

Individuals, such as managers and supervisors, *acting in the interest of an employer* can be held individually liable for any violations of the requirements of the FMLA.

XIV. COORDINATION WITH WORKERS' COMPENSATION

An on-the-job injury or illness often qualifies as a *serious health condition* under FMLA (defined in Section II). Accordingly, leave an FMLA-eligible employee takes in conjunction with a workers' compensation absence would count towards an employee's entitlement to 12 workweeks of FMLA leave (subject to proper notice and designation by the agency).

The following illustrates the manner in which an agency would coordinate the provisions of FMLA with workers' compensation laws and regulations for a FMLA-eligible employee:

- Under the provisions of NRS 281.390, an employee can elect to use sick leave to supplement temporary total disability benefits. Once an employee has exhausted his/her accrued sick leave, the employee can use annual leave as a supplement. Under the FMLA, an employee may use annual leave as a supplement without first exhausting his/her accrued sick leave.
- If an employee on FMLA leave has provided a completed medical certification form, only a health care provider representing the agency may contact (with the employee's permission) the employee's health care provider for purposes of clarification and authenticity of the medical certification. If FMLA leave is running concurrently with a workers' compensation absence, however, the agency may have direct contact with the employee's health care provider.
- An employee's health care provider may certify that the employee is able to return to a light-duty job but is unable to perform one or more of the essential functions of his/her pre-injury job. The employee may decline the offer of light-duty and continue on FMLA leave while he/she remains unable to perform any one or more of the job's essential functions, provided the employee's 12 workweek entitlement has not been exhausted. However, provisions of the workers' compensation law which allow compensation benefits to cease when an employee refuses a light-duty job that accommodates his/her limitations would apply.
- An employee who is able to return to a light-duty job may voluntarily (without coercion) accept a light-duty assignment while recovering from a serious health condition. Under such circumstances, an employee retains the right to be restored to the same or equivalent job until the entitlement to 12 workweeks of FMLA has passed. The 12 workweek period includes all FMLA leave taken during the "rolling" 12 month period plus the period of light duty.

- Because leave provided under a plan covering temporary disabilities (including workers' compensation) is considered paid leave, the provisions of FMLA allowing recovery of health insurance premiums are not applicable.
- An employee who is receiving temporary total disability payments is entitled to have the agency pay the State's share of the premium for employee-only group health coverage for up to 9 months in accordance with the provisions of NRS 287.0445.

XV. ACCOUNTING FOR LEAVE

A Request For Leave of Absence form (Refer to Section XVII for a copy of the NPD-60) and time reporting codes have been developed in order to assist agencies in determining whether leave may be counted towards an employee's entitlement to 12 workweeks of leave and to provide a method by which a centralized tracking of FMLA leave usage may occur.

At the time an employee gives notice of the need for leave for a FMLA-qualifying purpose (including workers' compensation leave, if applicable) a Request For Leave of Absence form (NPD-60) should be completed. As discussed previously, some leaves may also require a medical certification form. If the employee is not available to complete the employee portion of the NPD-60, the employee's supervisor can complete the form based on a conversation with the employee (for example, a supervisor may become aware while an employee is using sick leave that the absence may qualify as leave for the employee's serious health condition).

If an employee is *not* eligible for FMLA leave, this should be indicated in Section III of the NPD-60. Any substitution of paid leave should also be indicated in this section.

After the leave request is approved or denied, the original form should be submitted to the agency's appointing authority or designated representative for processing and placement in a locked cabinet, as required by NAC 284.726. A Employment Status Maintenance Transaction (ESMT) form should be submitted to Central Records for an employee who is on leave without pay or workers' compensation leave. An employee's failure to complete a Request for Leave of Absence form will not permit an agency to deny or delay an employee's taking FMLA leave if the employee has given timely verbal or other notice.

Properly coded Weekly Time Sheets must be submitted for employees on leave. The following time codes apply to eligible employees that are using leave for an FMLA-qualifying purpose:

UFMAL	FMLA Annual Leave
UFMCL	FMLA Catastrophic Leave
UFMFS	FMLA Family Sick Leave
UFMLP	FMLA Leave Without Pay
UFMSL	FMLA Sick Leave

These codes should be listed in the Event Codes column and corresponding hours should appear in the Hours columns. Refer to Section VII for further information regarding designation of leave as FMLA leave.

These codes will appear on the payroll registers, but not appear separately on an employee's pay checks. For individual eligibility and tracking purposes, an Advantage Employee Leave Accumulator Inquiry (QLAE) may also be used.

If an employee takes FMLA leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted towards the 12 workweeks of leave to which an employee is entitled. For example, if a 40-hour employee works 20 hours per week under a reduced work schedule, the employee would use one-half week of FMLA leave each week. Accordingly, at that rate it would take 24 weeks to exhaust the employee's FMLA leave entitlement.

Where an employee normally works a part-time schedule, variable hours, or more than 40 hours a week, the amount of leave to which an employee is entitled is determined on a pro rata basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours under a reduced leave schedule, the employee's ten hours of leave would constitute 1/3 of a week of FMLA leave for each week the employee works the reduced leave schedule.

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

Providing unpaid leave to a salaried executive, administrative, or professional employee excluded from receiving overtime compensation (excluded "E" employee) will not cause the employee to lose the Fair Labor Standards Act (FLSA) exemption. An employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek and maintain required records, without affecting the exempt status of the employee. The exception to the *salary basis* requirement applies **only** to employees who are eligible for FMLA leave and to leave which qualifies as FMLA leave.

XVI. RECORDS

- Records disclosing the following information must be kept for a minimum of three years.
- Basic payroll and identifying employee data.
- Dates FMLA leave is taken by FMLA eligible employees (to be specifically designated as FMLA leave).
- If FMLA leave is taken in less than full day increments, the hours of leave.
- Copies of employee notices of leave furnished to the agency, if in writing, and copies of all general and specific notices given to employees as required (e.g., NPD-60, NPD-62).

- Documents describing employee benefits or employee policies and practices regarding the taking of paid and unpaid leave.
- Premium payments of employee benefits.
- Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statements.

Records and documents relating to medical certifications, recertification or medical histories of employees or their family members, must be maintained in separate files/records and must be treated as confidential medical records with access limited accordingly.

XVII. FORMS AND NOTICES

- *Your Rights Under the Family and Medical Leave Act of 1993* - WH Publication 1420
- *U.S. Department of Labor Program Highlights* - ESA 95-24
- *Request for Leave of Absence* – NPD-60
- *Certification of Health Care Provider* – NPD-61
- *Employer Response to Employee Request for Family or Medical Leave* – NPD-62
- *Public Employee's Benefits Program - Benefits Change Form* - (0)-3081

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